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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 316

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE,
PETITIONERS,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD ET AL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 992.

S. H. DAVIS, J. A. WHITE, AND ANNIE WHITE,
PETITIONERS,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH, AND GEO. E. RIDER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, S. H. Davis, J. A. White and Annie White, respectfully present to this Court this their petition for Writ of Certiorari, to be directed to the Supreme Court of the State of Oklahoma, commanding said Court, and the Clerk thereof, to certify to this Court the records and proceed-

ings of the case in said Court wherein your petitioners were defendants in error and the respondents were plaintiffs in error, together with the opinion of said Court therein for the review and determination of said cause by this Court.

Your petitioners further show that a decree and decision was made and entered by the Supreme Court of the State of Oklahoma in said cause therein pending on the 7th day of October, 1924, wherein and whereby the judgment of the District Court of Love County, State of Oklahoma, was reversed and remanded. That thereafter, and within the time allowed by the rules of the Supreme Court of the State of Oklahoma, a petition for rehearing was filed with said Supreme Court of the State of Oklahoma, and thereafter, and on the 7th day of January, 1925, an order was made and entered, without opinion, denying the said petition for rehearing filed by your petitioners.

That on the 16th day of March, 1925, a certified copy of the entire transcript of the record in said case, including all the proceedings in said Supreme Court of the State of Oklahoma, to which the Writ of Certiorari herein prayed for is to be directed, was filed in this Court with the Clerk thereof, on Writ of Error to the said Supreme Court of the State of Oklahoma, and said case was docketed by the Clerk of this Court and numbered 992 of the October term, 1924, on said docket, and your petitioners hereby file this their petition for said Writ of Certiorari and they hereby refer to the transcript of the record now pending in this Court on Writ of Error, which said transcript of the record of the Supreme Court of the State of Oklahoma is hereby referred to and made a part hereof, the same as if said transcript were fully set forth herein in this petition for Writ of Certiorari.

Your petitioners show that there was selected by one Frazier McLish in his lifetime, as an allotment to which he was entitled as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma) certain lands; that the said Frazier McLish was a full-blood Chickasaw Indian, duly enrolled as shown on the final approved Chickasaw Roll, opposite No. 3805. That subsequent to the selection and allotment hereinabove set forth the said Frazier McLish, on the 10th day of February, 1907, departed this life and at the time of his death was a resident of the Southern District of the Indian Territory. That the said Frazier McLish, during his lifetime and on the 9th day of July, 1906, executed a will wherein he devised and bequeathed all his property to his sister, Julia Kemp, including the lands allotted to him as a member of the Chicksaw Nation.

Your petitioners further show that at the time of the death of the said Frazier McLish he left surviving him his wife, Millie McLish, and his daughters, Alice Williford, Allie Griffin and Rosie Williford, and that by the terms and provisions of said will he bequeathed to his wife, Millie McLish, the sum of one ($1.00) dollar, and to each of his daughters the sum of one ($1.00) dollar.

That prior to the date of the execution of said will the Congress of the United States passed an act known as the Act of April 26, 1906 (34 Stat. L. 137), which said act was approved on April 26, 1906, wherein it is provided, in Section 23 of said act, as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest

ings of the case in said Court wherein your petitioners were defendants in error and the respondents were plaintiffs in error, together with the opinion of said Court therein for the review and determination of said cause by this Court.

Your petitioners further show that a decree and decision was made and entered by the Supreme Court of the State of Oklahoma in said cause therein pending on the 7th day of October, 1924, wherein and whereby the judgment of the District Court of Love County, State of Oklahoma, was reversed and remanded. That thereafter, and within the time allowed by the rules of the Supreme Court of the State of Oklahoma, a petition for rehearing was filed with said Supreme Court of the State of Oklahoma, and thereafter, and on the 7th day of January, 1925, an order was made and entered, without opinion, denying the said petition for rehearing filed by your petitioners.

That on the 16th day of March, 1925, a certified copy of the entire transcript of the record in said case, including all the proceedings in said Supreme Court of the State of Oklahoma, to which the Writ of Certiorari herein prayed for is to be directed, was filed in this Court with the Clerk thereof, on Writ of Error to the said Supreme Court of the State of Oklahoma, and said case was docketed by the Clerk of this Court and numbered 992 of the October term, 1924, on said docket, and your petitioners hereby file this their petition for said Writ of Certiorari and they hereby refer to the transcript of the record now pending in this Court on Writ of Error, which said transcript of the record of the Supreme Court of the State of Oklahoma is hereby referred to and made a part hereof, the same as if said transcript were fully set forth herein in this petition for Writ of Certiorari.

Your petitioners show that there was selected by one Frazier McLish in his lifetime, as an allotment to which he was entitled as a portion of his pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma) certain lands; that the said Frazier McLish was a full-blood Chickasaw Indian, duly enrolled as shown on the final approved Chickasaw Roll, opposite No. 3805. That subsequent to the selection and allotment hereinabove set forth the said Frazier McLish, on the 10th day of February, 1907, departed this life and at the time of his death was a resident of the Southern District of the Indian Territory. That the said Frazier McLish, during his lifetime and on the 9th day of July, 1906, executed a will wherein he devised and bequeathed all his property to his sister, Julia Kemp, including the lands allotted to him as a member of the Chicksaw Nation.

Your petitioners further show that at the time of the death of the said Frazier McLish he left surviving him his wife, Millie McLish, and his daughters, Alice Williford, Allie Griffin and Rosie Williford, and that by the terms and provisions of said will he bequeathed to his wife, Millie McLish, the sum of one ($1.00) dollar, and to each of his daughters the sum of one ($1.00) dollar.

That prior to the date of the execution of said will the Congress of the United States passed an act known as the Act of April 26, 1906 (34 Stat. L. 137), which said act was approved on April 26, 1906, wherein it is provided, in Section 23 of said act, as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest

therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Your petitioners show that following the signature of said Frazier McLish, there appears on said will the following:

"We, James A. Cotner, George Cotner, and W. Wade, have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish at the request of the said Frazier McLish, and in his presence and in the presence of each other on this 9th day of July, 1906.

JAMES A. COTNER.
GEORGE COTNER.
W. WADE.

"Approved July 9, 1906.

[SEAL.] THOMAS N. ROBNETT,
U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in Accordance with the Act of Congress of April 26, 1906.

Your petitioners further show that under the proviso of said Section 23 of the Act of Congress of April 26, 1906 (34 Stat. L. 137),

"No will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such

full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

That subsequent to the death of the said Frazier McLish and on the 20th day of March, 1907, said will was duly admitted to probate by order of the United States Court for the Southern District of the Indian Territory and that thereafter the said Julia Kemp, being the devisee under the will of said Frazier McLish, deceased, by a good and sufficient warranty deed, conveyed the premises to your petitioner, J. A. White. That on November 15, 1907, the said petitioners, J. A. White and Annie White, went into possession of said premises and have been in the continuous, open and notorious possession of said premises ever since said date. That thereafter and on the 24th day of January, 1920, J. A. White and Annie White executed and delivered to S. H. Davis their certain promissory notes, which said notes were secured by a mortgage on ninety (90) acres of land which had been allotted to Frazier McLish, deceased, the said J. A. White, Annie White and S. H. Davis claiming title through Julia Kemp, the devisee under the will of the said Frazier McLish, deceased.

That this action was originally commenced to foreclose a second mortgage executed by said J. A. White and Annie White to the said S. H. Davis on said land and judgment was rendered in favor of the plaintiff in said action, to-wit: S. H. Davis, from which judgment an appeal was taken by the respondents herein to the Supreme Court of the State of Oklahoma, and an opinion and judgment was rendered by the Supreme Court of the State of Oklahoma reversing the

judgment of the District Court, said District Court having decreed that the respondents herein had no right, title or interest in and to the property sought to be foreclosed.

That on the trial of said cause in the District Court of Love County, Oklahoma, there was present as a witness on behalf of your petitioners, the Honorable Thomas N. Robnett, the said Thomas N. Robnett being the same Thomas N. Robnett by whom the will of Frazier McLish was approved, and the said Thomas N. Robnett in the trial of this cause testified that the said Frazier McLish did in fact appear before him, he then being a United States Commissioner for the Southern District of the Indian Territory, at the time the will of the said Frazier McLish bears date, and the said Thomas N. Robnett did further testify that the said Frazier McLish did in fact acknowledge the document to be his last will and testament; that findings of fact were made by the trial court in accordance with the testimony of the said Thomas N. Robnett, which findings of fact were not disturbed by the opinion and judgment of the Supreme Court of the State of Oklahoma.

Your petitioners further show that at the time the Act of Congress of April 26, 1906 (34 Stat. L. 137), became effective there was in force in the Indian Territory certain laws of Arkansas contained and set forth in Mansfield's Digest, and more particularly as substantially set forth in Section 6494, providing four requirements to the valid execution of a will:

> (1) It must be subscribed by the testator at the end of the will, *et cetera*.
>
> (2) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

(3) The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.

(4) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.

That Section 654 of Mansfield's Digest provides that the court or officer that shall take proof of an acknowledgment of any deed, etc., "shall grant a certificate thereof and cause such certificate to be endorsed on said deed," etc. That Section 646 of Mansfield's Digest provides substantially that the act (relating to conveyances of real estate) should not be construed so as to embrace last wills and testaments.

Your petitioners, J. A. White and Annie White, show that they claim a fee simple title to said land, and your petitioner, S. H. Davis, shows that he claims an interest in said land by virtue of a mortgage thereon, and that each and all of such claims and rights arise under a statute of the United States, to-wit: Section 23 of the Act of Congress of April 26, 1906 (34 Stat. L. 137).

Your petitioners further show that the Supreme Court of the State of Oklahoma, in its opinion, held that Section 23 of the Act of Congress of April 26, 1906, required that the United States Commissioner place upon a will a certificate of acknowledgment and the fact of the actual acknowledgment of the said will by the testator before the United States Commissioner was not a compliance with the Act of Congress of April 26, 1906 (34 Stat. L. 137), and that by virtue of the invalidity of said will to convey title your petitioners were

decreed to have no right, title and interest in and to the land which was the subject of the action in that there was not upon the face of the will itself a certificate of acknowledgment, when in truth and in fact the Indian testator had acknowledged said will before the United States Commissioner, and that no rights accrued to the devisee under said will or those claiming under her.

Your petitioners further show that the question herein involved is of great importance in that if the opinion of the Supreme Court of the State of Oklahoma is allowed to stand, many titles other than the title of your petitioners will fail.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of Oklahoma, commanding said Court to certify and send to this Court on a day to be designated the full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Oklahoma had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court, and that your petitioners may have such other and further relief and remedy in the premises as to this Court may seem appropriate and in conformity with law, and your petitioners will ever pray.

S. H. DAVIS,
J. A. WHITE,
ANNIE WHITE,
By CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Attorneys for Petitioners.

STATE OF OKLAHOMA,
Oklahoma County, ss:

C. B. Kidd, being first duly sworn, on his oath says that he is one of the attorneys for the petitioners in the above case; that he has read the foregoing petition and knows the contents thereof and that the allegations contained therein are true, as he verily believes.

C. B. KIDD.

Subscribed and sworn to before me this 27th day of March, 1925.

[SEAL.] INEZ MONTGOMERY,
Notary Public.

My commission expires August 4, 1927.

I hereby certify that I have examined the foregoing petition and in my opinion said petition is well founded in law.

CHARLES J. KAPPLER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 992.

S. H. DAVIS, J. A. WHITE and ANNIE WHITE, *Petitioners,*

versus

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH, and GEO. E. RIDER, *Respondents.*

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Court, by this proceeding, is asked to construe an Act of Congress, viz: The Act of April 26, 1906 (34 Stat. L. 137), and more particularly the proviso of Section 23 of said Act, which reads as follows:

> "Every person of lawful age and sound mind may, by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."

The facts in this case are undisputed. Frazier McLish was a full-blood Chickasaw Indian and during his lifetime there was selected by him and allotted to him, as a portion of his

pro rata share of the lands of the Choctaw and Chickasaw Nations or Tribes of Indians, in the Indian Territory (now State of Oklahoma), certain lands. Frazier McLish died on the 10th day of February, 1907, and at the time of his death he was a resident of the Southern District of the Indian Territory. On the 9th day of July, 1906, Frazier McLish executed a will wherein he devised and bequeathed to his sister, Julia Kemp, all of his property, including the lands allotted to him as a member of the Chickasaw Nation. At the time of his death, he left surviving him his wife and three children and to each of them he bequeathed the sum of One ($1.00) Dollar. The record shows that on the 9th day of July, 1906, the date on which he executed the will, Frazier McLish did, in fact, appear before the Honorable Thomas N. Robnett, a United States Commissioner for the Southern District of the Indian Territory, and that the said testator did, in fact, acknowledge the instrument to be his last will and testament. There was endorsed on the will by the said Thomas N. Robnett the following: "Approved July 9, 1906, Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906. Seal."

Subsequent to his death, the devisee under the will, Julia Kemp, by warranty deed conveyed a portion of the land allotted to Frazier McLish, deceased, to J. A. White and on the 24th day of January, 1920, J. A. White, joined by his wife, Annie White, made, executed and delivered certain mortgages, to secure certain notes, conveying ninety (90) acres of the land which had been allotted to Frazier McLish, deceased, and it is through and by virtue of the will of the said

Frazier McLish that the petitioners herein claim title to the land in controversy.

This suit was originally instituted in the District Court of Love County, Oklahoma, by S. H. Davis, for the purpose of foreclosing a second mortgage which had been executed to him by the said J. A. White and Annie White. On the trial of this cause the issue was raised that the will was insufficient to pass title in that the will had not been acknowledged by the testator within the true meaning of the Act of Congress. At the trial of this cause the Honorable Thomas N. Robnett, who had been United States Commissioner at the time, appeared as a witness on behalf of these petitioners and testified that the testator did in fact appear before him on the 9th day of July, 1906, that being the date of his will, and that the testator did, in fact, acknowledge the document which he had signed to be his last will and testament. The trial court made findings in accordance with the testimony of the United States Commissioner, which findings were not disturbed on appeal to the Supreme Court of the State of Oklahoma. The Supreme Court of the State of Oklahoma, however, held that what was contemplated by the Act of Congress was that the United States Commissioner must, at the time he approved a will, place on such will itself a certificate of acknowledgment, and the fact of acknowledging the will itself by the testator, in the absence of a certificate of acknowledgment by the United States Commissioner, rendered the document wholly insufficient as a will and was not a compliance with the Act of Congress requiring that a will of a full-blood Indian, devising real estate, providing such will disinherits his wife or children, must be acknowledged before and approved by a

Judge of the United States District Court for the Indian Territory, or a United States Commissioner.

There is, therefore, but one question for determination, viz: The proper construction to be placed upon the Act of Congress providing that no will of a full-blood Indian, disinheriting a wife or children, should be valid unless acknowledged before and approved by certain designated officers. In other words, what did Congress mean when it required that such will be acknowledged? It is the contention of the respondents, who come within the designated class set forth in the proviso, that Congress intended that there be placed on the will itself a certificate of acknowledgment, such as was and is required, or is at least permissible, on deeds of conveyance, while it is the view of the petitioners herein that the intent of Congress was that the full-blood testator should appear before the designated Federal officer and, by some act or token or spoken word, acknowledge the document to be his last will and testament. The act of acknowledging a will had always been considered the well-recognized substitute for signing in the presence of witnesses and it was this character of acknowledgment which Congress contemplated and not, as was held by the Supreme Court of Oklahoma, that the United States Commissioner should place on the will itself some sort of a certificate of acknowledgment. If such had been the intent of Congress, it would undoubtedly have so provided by apt words.

It must be remembered that Congress was legislating in respect to wills and not to deeds of conveyance. The latter, in very early times, required a certificate of acknowledgment for two purposes, viz: that they might be filed for record, and

further that they might be read in evidence without further proof.

The Statute of Frauds, 29 Car. 11, C. 3, Sec. 18 (1677) provided that a will devising lands "shall be in writing and signed by the party so devising the same or by some other persons in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect." All the statutes relating to wills enacted in England and in the several States in this country are based on this Statute of Frauds enacted in 1667. Of the requirement of the Statute of Frauds, 29 Car. 11, touching the attestation, the first point settled was that the witness need not see the testator sign. Soon after the statute was passed several of the judges maintained that there was not a sufficient attestation unless all the witness were present at the same time and saw the testator sign; but it was soon settled that inasmuch as the statute did not require the testator to sign in the presence of witnesses, it was enough if he acknowledged to them the will he had already signed.

Cook *vs.* Parsons (1701), Finch's Pres. Ch. 184;
Stonehouse *vs.* Evelyn (1734), 3 P. Wms. 252;
Grayson *vs.* Atkinson (1752), 2 Ves. Sr. 454.

It will be noted that the original Statute of Frauds did not specifically provide that the will might be acknowledged by the testator but, by a proper judicial construction, it was soon held that the acknowledgment was sufficient as a substitute for the signing in the presence of the witnesses. The result is that the statutes of practically all of the states permit, as a substitute for the signing in the presence of wit-

nesses, an acknowledgment by the testator, and this was the general statute relating to wills in force in the Indian Territory, wherein it was provided "such subscription shall be made by the testator in the presence of each of the attesting witnesses or shall be acknowledged by him to have been so made, to each of the attesting witnesses." An examination of the statutes of the several states and the construction placed thereon shows that even where an acknowledgment is not expressly allowed in lieu of the signing in the presence of the witnesses, the acknowledgment by the testator is held to be a sufficient compliance with the statute.

Woodruff *vs.* Hundley, 127 Ala. 640; 29 So. 98;
Sterling *vs.* Sterling, 64 N. D. 138;
Hall *vs.* Hall, 17 Pick. (Mass.) 373;
Cravens *vs.* Falconer, 28 Mo. 19;
Welch *vs.* Adams, 63 N. Ham. 344; 1 Atl. 1;
Raudebaugh *vs.* Shelley, 6 Ohio St. 307.

The cases we have cited and other cases which we might cite show that the word "acknowledgment" or "acknowledged" had a well-defined meaning in respect to wills at the time of the Congressional enactment under discussion and thereafter this well-defined meaning became a part of the statute.

It is a received canon of construction that where statutes have been adopted, the known and settled construction of those statutes has been construed as silently incorporated into the statute.

McDonald *vs.* Hobey, 110 U. S. 619; 4 Supr. Crt. Rep. 142;
Interstate Com. Com. *vs.* Baltimore & O. R. Co., 145 U. S. 263; 12 Supr. Crt. Rep. 844.

It may be conceded that a certificate by the officer before whom the full-blood Indian was required to appear would not have invalidated the will, but the adding of a certificate would have been mere surplusage.

Andrew C. Keely, Trustee *vs.* Jos. H. Moore, 196 U. S. 38; 26 Supr. Crt. Rep. 169.

Congress intended that the Indian testator appear before a particular designated Federal officer and acknowledge the will before him. Such officer might have placed on the will any sort of certificate he may have wished, however it was not the certificate of the officer which gave the will validity, but it was the acknowledgment by the Indian testator before such officer which gave the will validity. As has been pointed out, the purpose of a certificate of acknowledgment on an instrument is that the instrument may be recorded and read in evidence without further proof. This rule does not obtain in respect to wills in that a will is not necessarily recorded and the presence of a certificate of acknowledgment on a will or an attestation clause does not dispense with the necessity of producing at the trial, when a will is set up as a muniment of title or when it is offered for probate, all of the attesting witnesses, if they are available. It is customary, but never required, so far as we have found, for the attesting witnesses to sign what is commonly called an attestation clause, but we know of no statute in any state which makes such a clause a pre-requisite to the validity of the will itself.

Congress could have, but did not, require the will to be signed in the presence of the United States Commissioner, he being the designated attesting witness, but only required an *acknowledgment* before him. This acknowledgment was

an act of the testator and not an act of the United States Commissioner.

The Act of Congress seems to have contemplated that the will of a full-blood Indian testator, if he disinherits by such will a certain designated class of persons, should have been completed as a testamentary document, under the local laws, when the Indian in person presents it to the United States Commissioner. The Indian testator then, by some act, sign or spoken word, acknowledges the document or acknowledges his signature (whichever is contemplated) and then the United States Commissioner either approved or disapproved the instrument. In this case the testator acknowledged the instrument and acknowledged his signature and the United States Commissioner did approve the instrument and subscribed his name to it.

The question presented is one of importance in that titles other than that of the petitioners herein will necessarily fail if the opinion of the Supreme Court of the State of Oklahoma is permitted to stand as the law applicable.

Further argument and citation of authorities is not considered necessary here, but if this Honorable Court should grant this petition for certiorari, the questions involved will be fully and thoroughly presented by brief and argument when the case is regularly called.

Respectfully submitted,

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Attorneys for Petitioners.

[Endorsed:] In the United States Supreme Court, October term, 1924. S. H. Davis et al. plaintiff, vs. Alice Williford et al., defendants. Petition for Writ of Certiorari and Argument in Support Thereof. McQueen & Kidd, Attorneys at Law, 1009 Colcord Building, Attorneys for petitioner.

[Endorsed:] File No. 30957. Supreme Court U. S., October Term, 1924. Term No. 992. S. H. Davis et al., Plaintiffs in Error, vs. Alice Williford et al. Petition for Writ of Certiorari. Filed March 31, 1925.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 316

S. H. DAVIS, J. A. WHITE AND ANNIE WHITE
PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH AND GEORGE E. RIDER, DEFENDANTS IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

CHARLES J. KAPPLER,
I. R. McQUEEN,
C. B. KIDD,
Counsel for Plaintiffs in Error.

Francis & Holden, Brief Printers, 206½ N. Broadway, Oklahoma City, M. 6245

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 316.

S. H. DAVIS, J. A. WHITE AND ANNIE WHITE PLAINTIFFS IN ERROR,

vs.

ALICE WILLIFORD, ALLIE GRIFFIN, ROSIE WILLIFORD, MILLIE McLISH AND GEORGE E. RIDER, DEFENDANTS IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This case is reported below in 106 Okla. 208. The style of the case below is *Williford* v. *Davis*.

The Supreme Court of Oklahoma, under date of October 7th, 1924 (R. 75), rendered a judgment reversing the judgment and decree of the trial court (R. 65-68).

Under the rules of the Supreme Court of Oklahoma, these plaintiffs in error, who were defendants in error in the Supreme Court of the State of Oklahoma, filed a

petition for rehearing (R. 83) and a brief in support thereof (R. 84), and on January 7th, 1925 (R. 94), an order was made by the Supreme Court of Oklahoma denying the petition for rehearing filed by these plaintiffs in error. An application to file a second petition for rehearing was denied March 5th, 1925 (R. 95).

A transcript of the complete record of the Supreme Court of Oklahoma, together with a petition for a writ of error (R. 1), assignments of error (R. 3), order allowing writ (R. 5), and writ of error (R. 6) was filed with the clerk of this Court on March 16th, 1925 (R. 95).

A petition for a writ of certiorari was filed by the plaintiffs in error, as petitioners, with the clerk of this Court on March 31st, 1925, and on June 1st, 1925, this Court ordered that action on the petition for a writ of certiorari be postponed until the hearing on the writ of error.

In the Supreme Court of Oklahoma, which is the highest court of that state in which a decision in the suit could be had, there was drawn in question the validity of a statute of the United States, namely, Section 23 of the Act of Congress of April 26th, 1906; 34 Stat. L. 137, and the decision was against the validity of such statute, or these plaintiffs in error claim certain

rights, titles and privileges under and by virtue of this statute of the United States (R. 75).

The statute of the United States, which is the basis of the claim of the plaintiffs in error, is the Act of Congress of April 26th, 1906; 34 Stat. L. 137. The title of the act reads as follows:

> "AN ACT TO PROVIDE FOR THE FINAL DISPOSITION OF THE AFFAIRS OF THE FIVE CIVILIZED TRIBES IN THE INDIAN TERRITORY AND FOR OTHER PURPOSES."

Section 23 of this act is the special congressional enactment on which these plaintiffs in error rely. This section is as follows:

> "Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before, and approved by, a judge of the United States Court for the Indian Territory or a United States Commissioner."

The claim advanced by these plaintiffs in error in the lower courts was that the true intent and meaning of the act relied upon was that the full-blood Indian testator, in order to disinherit his wife and children, should, in fact, acknowledge his will before and in the presence of either a judge of the United States Court

for the Indian Territory or a United States Commissioner, in which event, it would be a valid will, and upon the death of the testator would be sufficient to pass title to the allotted lands of the Indian.

The claim of the defendants in error is that the Act of Congress required the formal execution of a certificate of acknowledgment by one of the officers designated by Section 23 of the Act of Congress, and that such certificate of acknowledgment by the officer must appear on the face of the will itself.

The latter view was sustained by the Supreme Court of the State of Oklahoma (R. 75).

This cause is before this Court under the provisions of Section 237 of the Judicial Code as amended by Act of September 6, 1916, C. 448, 39 Stat. L. 726. Counsel for the plaintiffs in error were in doubt as to the proper method whereby the judgment and opinion of the Supreme Court of Oklahoma might be reviewed by this Court and come to this Court on a writ of error from the State Supreme Court. There was also filed in this Court a petition for a writ of certiorari.

The plaintiffs in error claim certain rights to lands, and this claim is based on what we conceive to be a proper construction of a Federal statute. The Supreme Court of Oklahoma based its opinion and judg-

ment upon a purely Federal question of substance, not heretofore determined by this Court, and the State Supreme Court decided the question presented in a way probably not in accord with the applicable principles of law.

Whether certiorari or writ of error was the proper method, in order to present this case for review by this Court, appeared to us a doubtful question, and hence both certiorari and writ of error were resorted to.

It appears that jurisdiction has been taken by this Court in determining somewhat similar questions, in some cases by certiorari and in other cases by a writ of error.

Blundell v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373.
Grayson v. *Harris*, decided March 2nd, 1925, 267 U. S. 352.
Kenny v. *Miles*, 250 U. S. 58.

STATEMENT OF CASE

This action was originally brought in the District Court of Love County, State of Oklahoma, by S. H. Davis to foreclose a mortgage (R. 8), executed by J. A. White and Annie White, his wife, on ninety acres of land in Love County, State of Oklahoma. This land was a portion of the land allotted to Frazier McLish as a portion of his pro rata share of the lands of the

Choctaw and Chickasaw Nations or Tribes of Indians in the Indian Territory (now State of Oklahoma), (R. 34).

Frazier McLish was a full-blood Chickasaw Indian. The land was selected by him and allotted to him in his lifetime. He died on the 10th day of February, 1907 (R. 47), and at the date of his death was a resident of the Southern District of the Indian Territory (R. 47). On July 9th, 1906, Frazier McLish executed a will whereby he devised and bequeathed to his sister, Julia Kemp, all of his property, including the lands allotted to him as a member of the Chickasaw Nation (R. 47). On the date of his death he left surviving him as his heirs his wife, Millie McLish, and three children, Alice Williford, Allie Griffin and Rosie Williford (R. 31), and to each of them he bequeathed the sum of one dollar ($1.00).

Julia Kemp, the devisee under his will, under date of November 15th, 1907 (R. 62), conveyed by a warranty deed the land which is the subject matter of this action to J. A. White. J. A. White went into possession on January 1st, 1909 (R. 64).

The plaintiffs in error claim the title under the will of Frazier McLish, while the defendants in error claim title as heirs at law of Frazier McLish, deceased, ex-

cept the defendant in error, George E. Rider, who claims an interest in the land under a duly approved contract (R. 36) with his co-defendants in error.

The will of Frazier McLish is as follows:

"I, Frazier McLish, being of lawful age, and sound mind and disposing memory, do declare this to be my last will and testament; hereby revoking all others heretofore made by me at any time.

"First. I hereby nominate and appoint Roberson Kemp of Emit, I. T., to be the sole executor of this, my last will and testament.

"Second. My will is that all just debts and funeral expenses be paid out of any of my estate, either real or personal, by my said executor.

"Third. I hereby give and bequeath to my wife, Millie McLish, one dollar; to my daughter, Alice McLish, one dollar; to my daughter, Allie McLish, one dollar, and to my daughter, Ruthie McLish, one dollar.

"Fourth. After my debts and funeral expenses and the bequests given to my wife and children are all fully paid and discharged, I give, devise and bequeath unto my sister, Julia Kemp, all my property of every kind, and both real and personal, including all of my allotment in the Choctaw and Chickasaw Nations, which has now been taken in allotment by me and which may be taken in allotment for me after my death, and all moneys which are due me and may hereafter be due me from the United States or from the Choctaw and Chickasaw Nations as a member of the Chickasaw Tribe of Indians.

"In testimony whereof, I have hereunto set my hand and seal and do declare and publish this as my last will and testament this 9th day of July, 1906.

"Frazier McLish.

"We, James A. Cotner, George Cotner and W. Wade, have hereunto subscribed our names as witnesses to the above and foregoing last will and testament of Frazier McLish, at the request of the said Frazier McLish, and in his presence and in the presence of each other, on this 9th day of July, 1906.

"James A. Cotner.
"George Cotner.
"W. Wade.

"Approved by me July 9, 1906. Thomas N. Robnett, U. S. Commissioner for the Southern District, Indian Territory, First Commissioner's District, in accordance with the Act of Congress of April 26, 1906 (Seal)" (R. 22-47).

This will was admitted to probate in the United States Court for the Southern District of the Indian Territory on April 16, 1907 (R. 50), and letters testamentary were issued to the executor named in the will (R. 52).

The will was approved by the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of the Indian Territory, on July 9, 1906, as evidenced by the endorsement of the United States Commissioner at the end of the will and following the attestation clause subscribed by the attesting witnesses (R. 22-47).

The will did not have on its face a formal certificate of acknowledgment executed by the United States Com-

missioner, but at the trial of this cause in the trial court, these plaintiffs in error produced as a witness on their behalf, the Honorable Thomas N. Robnett, who testified that on July 9, 1906, he was a United States Commissioner for the Southern District of the Indian Territory; that the testator, together with two of the attesting witnesses, brought the document to him on that day; that he talked the matter over with the testator, asked him if he understood it and the effect of it, and that the testator then acknowledged the document to be his will (R. 55, 56, 57, 58).

The trial court found that the testator had, in fact, acknowledged the will before the United States Commissioner, as shown by the findings of the trial court, as follows:

"The court further finds that the said will of Frazier McLish was acknowledged before, and approved by, the Honorable Thomas N. Robnett, United States Commissioner for the Southern District of Indian Territory, on the 9th day of July, 1906, and that said approval is in all respects as required by the Act of Congress, and said will is legal and valid and passed all of the right, title and interest of the said devisor in and to said premises to the said Julia Kemp" (R. 70).

The State Supreme Court did not disturb these findings of fact made by the trial court, but based its opinion on the theory that Section 23 of the Act of Congress required the execution of a formal certificate of ac-

knowledgment by the United States Commissioner, and that this certificate must appear on the face of the will itself.

ASSIGNMENTS OF ERROR.

It is contended by the plaintiffs in error that the Supreme Court of Oklahoma erred in its judgment and opinion as follows:

I. That the Supreme Court of the State of Oklahoma erred in holding and deciding that a certificate of acknowledgment was essential to the validity of a will of a full-blood Indian testator, devising any part of his real estate to the exclusion of his wife and children (R. 4).

II. That the Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of the said Honorable Thomas N. Robnett, United States Commissioner at the time such will was in fact acknowledged, in the trial of this cause in the District Court of Love County, State of Oklahoma, was not a sufficient compliance with Section 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137 (R. 4).

III. That the Supreme Court of the State of Oklahoma erred in holding that the purported devise by the said Frazier McLish, deceased, to his sister, Julia

Kemp, was invalid and void and passed no title to the land sought to be foreclosed, in the action instituted in the District Court of Love County, Oklahoma (R. 4).

Inasmuch as each assignment of error relates to the same subject matter, each will be presented in this brief under one argument.

ARGUMENT.

Briefly stated, it is claimed by the plaintiffs in error that the proper construction of Section 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137, as related to the will of a full-blood Chickasaw Indian whereby he devises his lands to the exclusion of his wife and children, is that the Indian testator appear before the United States Commissioner and by some act, sign or spoken word, acknowledge the document presented, to be his will, and it is the fact of such acknowledgment by said testator, and not any certificate by the officer, which gives validity to the will; at least, such acts or conduct by the testator are a compliance with the statutory requirement. If our view is correct, the plaintiffs in error should prevail. If, on the other hand, Congress intended to require that a certificate of acknowledgment be placed on the will itself by the officer, then concededly, plaintiffs in error cannot prevail.

It is necessary to consider the state of the law as

it existed in the Indian Territory in respect to the right of an Indian to make a will devising lands at the time of the congressional enactment, under which we claim title.

Under the Act of Congress of April 28th, 1904, C. 1824, Sec. 2, 33 Stat. L. 573, it was provided, among other things, as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

The Arkansas law of wills was a part of the law that had thus been adopted and put in force in the Indian Territory before 1904 (Section 31 of the Act of Congress of May 2nd, 1890, 26 Stat. L. 81).

The Act of Congress of April 28th, 1904, C. 1824, Sec. 2, 33 Stat. L. 573, enabled an Indian in the Indian Territory to devise all his alienable property by will made in accordance with the laws of the State of Arkansas, but this act did not operate to remove any of the restrictions theretofore placed on the lands of the Indian by the Act of Congress. This was the holding

of this Court in the case of *Taylor* v. *Parker*, 235 U. S. 42. In that case, an Indian allottee made a will on March 22, 1905, and died on March 25th, 1905. She devised to her husband her allotment to the exclusion of her heirs. This Court held that at that time her allotted land was restricted under the Supplemental Agreement with the Choctaw and Chickasaw Nations, ratified by the Act of Congress of July 1st, 1902, 32 Stat. L. 641, C. 1362, and that this restriction upon alienation extended to a devise by will, but further held that the extension of the laws of Arkansas, theretofore put in force in the Indian Territory, enabled an Indian in the Indian Territory to devise all of his alienable property by will, made in accordance with the laws of the State of Arkansas, but did not operate to remove any of the restrictions on alienation by Indian allottees theretofore made by congressional legislation.

It was only by virtue of Section 23 of the Act of Congress of April 26th, 1906, that an Indian could alienate his real estate by will. By Section 23 the Indian was given the right to dispose of all his estate, real and personal, by will. This was a right he had not theretofore had. There was, however, in Section 23 the proviso in respect to the will of a full-blood Indian devising real estate, namely:

"That no will of a full-blood Indian devising real

estate shall be valid if such last will and testament disinherits the parent, wife, spouse or children of such full-blood Indian, unless acknowledged before, and approved by, a judge of the United States Court for the Indian Territory or a United States Commissioner."

(Proviso to Sec. 23 of the Act of Congress of April 26, 1906, 34 Stat. L. 137.)

The will of any Indian, regardless of the degree of blood, devising real estate must, by virtue of the provisions of the Act of Congress of April 28th, 1904, C. 1824—Sec. 2, 33 Stat. L. 573, comply with the laws of the State of Arkansas, theretofore adopted in the Indian Territory, in respect to form, execution, mode and manner of attestation and acknowledgment.

The will of a full-blood Indian, however, in addition to the requirements which effected, and which were applicable to all Indians, must be acknowledged before one of the designated officers.

It appears that Congress contemplated that the will of a full-blood Indian be completed under the local law applicable, as a testamentary document, and in addition to the requirements of the local law, or in conjunction with it, the Indian testator should appear before either designated officer and acknowledge the document he had executed to be his will.

That the local law, in respect to wills and descents, is

applicable is the effect of the holding of this Court in the case of *Blundell* v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373, 45 Sup. Ct. Rep. 247. In that case the Indian testatrix died in 1912. She bequeathed her entire allotment to her great grand daughters to the exclusion of her husband. The defendant in error in that case asserted title through *mesne* conveyances from the surviving husband of the testatrix. The question before this Court was the effect of Section 11,224, Compiled Statutes of Oklahoma 1921, which reads as follows:

> "Every estate and interest in real or personal property, to which heirs, husband, widow or next of kind might succeed, may be disposed of by will; provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, *nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will" (italics are in this Court's opinion).

The plaintiffs in error in that case contended that this statute, as applied to the will of the Indian testatrix, was in direct conflict with Section 23 of the Act of Congress of April 26th, 1906, which is the statute now before the Court for construction.

This Court said, in passing on the contention, that the state statute was in conflict with Section 23:

> "A brief reference to the state of the law at the time of the passage of Section 23 will help to clear the way for a correct determination of the question. By Sections 12 and 16 of the Supplemental Agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, *supra*, lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will, *Taylor* v. *Parker*, 235 U. S. 42, 35 S. Ct. 22, 59 L. ed. 121; and, but for section 23, it is plain that the devise in question, at least as to the homestead, would have been without effect.
>
> "But, it must be borne in mind, the restriction was in respect of the specified lands and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first, by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma, by the substitution therefor of Oklahoma law. *Taylor* v. *Parker*, *supra*; *Jefferson* v. *Fink*, 247 U. S. 288, 294, 38 S. Ct. 516, 62 L. ed. 1117. The general policy of Congress, prior to the adoption of Section 23, plainly had been to consider the local law of descents and wills applicable to the persons and estates of Indians except insofar as it was otherwise provided. Thus, by Section 2 of the Act of April 28, 1904, C. 1824, 33 Stat. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly 'continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise,' and juris-

diction was conferred upon the courts of the territory in the settlement of the estates of decedents, etc., whether Indian, freedmen or otherwise.

"Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the state supreme court that Congress intended thereby to enable 'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto'. The effect of Section 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property."

In determining, therefore, the intent of Congress at the time of the adoption of Section 23 in respect to the use of the word "acknowledged," as set forth in the proviso, reference should properly be had to the regulatory local law as well as to the well recognized meaning of the word "acknowledged" in respect to wills, which had been construed by the courts, both in England and in this country, since the Statute of Frauds enacted by the English Parliament in 1677, 29 Car. II, C. 3, Sec. 5.

The regulatory local law, in respect to wills, was the law of Arkansas theretofore put in force in the Indian Territory. The applicable provisions relating to wills is set forth in Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, being the laws of Arkan-

sas as published in 1884 (Act of Congress, May 2, 1890, 26 Stat. L. 81, Section 31). The applicable statutes are as follows:

> "Sec. 6492. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:
>
> "First: It must be subscribed by the testator at the end of the will, or by some person for him, at his request.
>
> "Second: Such subscription shall be made by the testator in the presence of each of the attesting witness, or shall be acknowledged by him to have been so made to each of the attesting witnesses.
>
> "Third: The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.
>
> "Fourth: There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

These sections of the statute are set forth to show the applicable local law and more particularly to show the state of the law as set forth in subdivisions second and third of Section 6492, wherein it is provided that in the event the testator does not sign the will in the presence of the attesting witnesses there is a provision that the subscription shall be "acknowledged" to each of the attesting witnesses.

There was also in force in the Indian Territory, Chapter 27 of Mansfield's Digest, relating to Conveyances of Real Estate. The applicable provisions of this chapter are as follows:

"Sec. 646. This act shall not be construed so as to embrace last wills and testaments.

* * * * * * *

"Sec. 654. Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the real estate of her husband, shall grant a certificate thereof and cause such certificate to be indorsed on said deed, instrument, conveyance or relinquishment of dower, which certificate shall be signed by the clerk of the court where probate is taken in court, or by the officer before whom the same is taken and sealed, if he have a seal of office.

* * * * * * *

"Sec. 664. Every deed or instrument in writing, conveying or affecting real estate which shall be acknowledged or proved and certified, as prescribed by this act, may, together with the certificate of acknowledgment, proof or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby shall be situate, and when so recorded may be read in evidence without further proof of execution."

This chapter was adopted and put in force in the Indian Territory under the Act of Congress of February 19th, 1903, 32 Stat. L. 841.

These sections of the local law are set forth partic-

ularly to show the distinction existing at that time in the Indian Territory between the acknowledgment of a will and the certificate of acknowledgment required, or at least permitted, on deeds of conveyance.

The State Supreme Court seems to have failed to distinguish between the certificate of acknowledgment required, or at least permitted, to be placed on a deed of conveyance and the well recognized rule in respect to wills, whereby, in the event the witness did not see the testator sign his will it was sufficient that the testator acknowledge the will, or the signature, in the presence of the witness.

This "acknowledgment" by the testator had at the time of the congressional enactment, as set forth in Section 23, become a well recognized substitute for signing in the prescence of the witnesses. This had become a rule of substantive law, not only in the Indian Territory, but in the several states of the United States and in England, subsequent to the enactment of the Statute of Frauds.

We think it clear that Congress, in legislating in respect to the will of a full-blood Indian, as an additional precaution against the perpetuation of any fraud, or the taking of any undue advantage, intended that the testator come before a certain designated officer and ac-

knowledge the document as his will, and it thereby became the duty of the officer in whom Congress had placed confidence to either approve a will or disapprove it.

Congress also contemplated that there should be some act on the part of the Indian testator, and this act was his acknowledgment or statement or some act or sign to indicate to the officer that the document was his will, while the act of approval was that of the officer.

The regulatory local law, as we have shown, clearly distinguished between a certificate of acknowledgment which might be placed on a deed of conveyance and the "acknowledgment" which related to the due and proper execution and attestation of wills. The former required a certificate by the officer, the latter did not.

It will be noted that Section 23 does not purport to supersede the applicable local law in any respect so far as the form, mode and manner of execution, attestation or acknowledgment of the will of an Indian testator was concerned. The local law, therefore, was the law applicable to such matters.

Blundell v. *Wallace*, decided March 2nd, 1925, 267 U. S. 373, 45 Sup. Ct. Rep. 247.
U. S. v. *Fox*, 94 U. S. 315.

The applicable local law also specifically provided that the chapter on conveyances, which was in force in the Indian Territory, should—

"not be construed so as to embrace last wills and testaments."

(Sec. 646, Chapter 27, Mansfield's Digest, *supra*).

But, regardless of the local law which was applicable to all wills, the word "acknowledged" in respect to wills had received a well recognized construction since the first English Statute of Frauds, enacted by the English Parliament in 1677, 29 Car. II, C. 3, Sec. 5. The applicable provision is as follows:

"And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the statute of wills or by this statute or by force of the custom of Kent or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses or else they shall be utterly void and of none effect."

All of the statutes relating to wills enacted in England or in this country are based on the original Statute of Frauds, enacted in the year 1677. Under this statute a will, among other things, shall be:

"Attested and subscribed in the presence of the said devisor by three or four credible witnesses.

"Of the requirement of the Statute of Frauds,

29 Car. II, touching the attestation, the first point settled was that the witnesses need not see the testator sign. Soon after the statute was passed several judges maintained that there was not a sufficient attestation unless all the witnesses were present at the same time and saw the testator sign; but it was soon settled that inasmuch as the statute did not require the testator to sign in the presence of the witnesses, it was enough that he acknowledged to them the will he had already signed."

Rood on Wills, Section 273.

The author above quoted cites cases to which we do not have access, hence we cannot verify the citations. Citing:

Cook v. *Parsons* (1701), Finch's Prec., Ch. 184.
Stonehouse v. *Evelyn* (1734), 3 P. Wms. 252.
Grayson v. *Atkinson* (1752), 2 Ves. Sr. 454.
Ellis v. *Smith* (1754), 1 Ves. Jr. 11.

It will be noted that the original Statute of Frauds did not specifically provide that the will might be acknowledged by the testator, but it was soon held that the acknowledgment was sufficient as a substitute for signing in the presence of the witnesses.

Rood on Wills, Sec. 273.

It will be noted that the statute in force in the Indian Territory, relating to wills, expressly allowed the subscription of the testator to:

"Be acknowledged by him to have been so made to each of the attesting witnesses."

(Subdivision 2, Sec. 6492, Mansfield's Digest.)

Regardless of the fact that according to the statutes of some states, subsequent acknowledgment is not specifically allowed as a substitute for signing in the presence of witnesses, such acknowledgment is held to be sufficient.

Woodruff v. *Hundley*, 127 Ala. 640.
Stirling v. *Stirling*, 64 Ind. 138.
Hall v. *Hall*, 17 Pick. (34 Mass.) 373.
Cravens v. *Falconer*, 28 Mo. 19.
Welch v. *Adams*, 63 N. Ham. 344.
Raudebaugh v. *Shelly*, 6 Ohio St. 307.

These cases show that the word "acknowledgment" and "acknowledged" had a well defined meaning at the time of the enactment of Section 23; and, therefore, this well defined meaning became a part of the statute.

McDonald v. *Hovey*, 110 U. S. 619.
Interstate Com. Co. v. *Baltimore & O. R. Co.*, 145 U. S. 263.

In view, then, of the previous statutory provisions providing for acknowledgment of wills, and the judicial construction placed thereon by the courts, it seems improbable to suppose that Congress intended that the United States Commissioner must place on the will itself a certificate of acknowledgment, as was the holding

of the lower court. It would appear to be as reasonable to say that all legislative provisions relating to the acknowledgment of wills as a substitute for signing in the presence of the witnesses, required a certificate of the attesting witnesses, as to say that the acknowledgment provided for in the Act of Congress required that a certificate be added to the will itself. It is customary, but, so far as we know, never required, for the attesting witnesses to sign what is known as an attestation clause, but we know of no statute in any state which makes such a clause a prerequisite to the validity of the will.

The law relating to wills in force in the Indian Territory did not require a certificate by the attesting witnesses and had a certificate been placed thereon it would have been mere surplusage. *Keely, Trustee,* v. *Moore,* 196 U. S. 38. A certificate was required only on deeds of conveyances to the end that they might be recorded and then—

"read in evidence without further proof."

(Sec. 664, Mansfield's Digest.)

The various states of the Union have statutes which require forms of acknowledgment for deeds and specify the officers who may take the acknowledgment and designate what the certificate of acknowledgment may con-

tain, but this is for an entirely different purpose than that contemplated by the Act of Congress under consideration.

These statutes are quite different from the requirement of the Act of Congress giving no form, but simply requiring that the Indian should appear before the proper officer and acknowledge the document as his will. It would seem more consistent with the purpose of the act to so construe it, not that certain certificates should be endorsed on the will by the officer, but that the Indian be required to come in person before the commissioner and acknowledge the document and request the approval of the commissioner, all of which was done in this case.

It seems clear that if Congress had intended that the officer place on the will itself a certificate of acknowledgment such intention would have definitely been made to appear by the use of apt words.

It will be readily conceded that a certificate of acknowledgment placed on the will itself by the United States Commissioner would not have vitiated the effect of the document as a will. It might serve the purpose of an attestation clause, which is usual but not required. A certificate of acknowledgment would, as we view the case, have been altogether superfluous. We quote from Schouler on Wills, 6th ed., Vol. 1, Sec. 554:

"The certificate of acknowledgment usual in deeds is altogether superfluous in a will; but it may have the usual effect, provided all other formalities are consistent, of converting the notary or magistrate himself into one of the subscribing witnesses. A clerk of a court who witnesses a will does not affect its validity by attaching his official seal and certificate; at the same time he should have dispensed with it."

The following authorities support the text:

Payne v. *Payne*, 54 Ark. 415, 16 S. W. 1.
Franks v. *Chapman*, 64 Texas 159.

As a further aid in determining the Congressional intent in the use of the word "acknowledged" in the proviso of Section 23, resort should properly be had to the character of proof required to prove the proper execution and attestation of a will when presented either for probate or as a muniment of title.

The following sections of Chapter 155 of Mansfields Digest were in force when the Act of Congress was approved (Section 31 of the Act of Congress of May 2, 1890, 26 Stat. L. 81):

"Sec. 6515. When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane or absent, and of such other circumstances as would be sufficient to prove such will on a trial at common law.

"Sec. 6516. If it shall appear to the satisfaction of the court or clerk that all the subscribing wit-

> nesses to the will are dead, insane or absent, the court or clerk shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will in a trial at law."

These sections of the applicable local law are set forth primarily to show that under the local law it was not contemplated that any certificate of any of the attesting witnesses would, in itself, be sufficient to prove the document as a will, but it was required that the attesting witnesses, if available, be produced as witnesses, giving to all parties the right to cross examine, and in the event of inability to produce one or all of the subscribing witnesses at the trial, then it was provided that the will might be probated by the evidence of such facts and circumstances

> "as would be sufficient to prove such will on a trial at common law."

(Section 6515, Mansfield's Digest, *supra*).

The proof required in order to establish what the testator did and in order to establish the will as a devise of real property was not interfered with by any Congressional enactment, and it is not probable to suppose that Congress contemplated that a certificate of the officer would, in the face of the rules of evidence then in force, be sufficient to establish the fact of such acknowledgment.

This will was duly admitted to probate in the United States Court for the Southern District of the Indian Territory, and but for the probable binding effect of a question of procedure under the local law as determined by the State Supreme Court in the case of *Armstrong* v. *Letty*, 85 Okla. 205, the order of the United States Court for the Southern District of the Indian Territory in admitting the will to probate would have determined the fact of the proper acknowledgment of the will under the Act of Congress.

The effect of the decision in the case of *Armstrong* v. *Letty*, *supra*, was that the judgment admitting the will to probate would not conclude an heir of a full-blood Indian from attacking the fact of such approval and acknowledgment in a proceeding brought in which the will was set up as a muniment of title. The effect of the holding of the State court in that case was that the judgment of the court admitting the will to probate merely had the effect of determining that it had been executed in accordance with the requirements of the local law and did not determine the validity of the will as a conveyance of restricted Indian land. The particular acknowledgment and approval, as provided by Section 23 of the Act of Congress, was, therefore, reserved for determination when the will of the full-blood testator was offered in evidence in a suit involving the title to lands devised by such full-blood Indian.

However, it certainly was not contemplated by Congress that the precautionary rules of evidence applicable to the proving of the acknowledgment of wills, whereby it was provided that the witnesses themselves, if available, should be personally present on the trial of the cause and be subjected to cross examination, should be abrogated, and that there should be substituted therefor a rule that a certificate of acknowledgment should be sufficient in lieu of the personal presence of the person of the officer before whom the will was acknowledged if his personal presence was available. It seems clear that if such a sweeping change was contemplated Congress would have definitely so stated.

Congress knew that an acknowledgment to a deed could be proved by the certificate of the officer, but, on the other hand, Congress also knew that a will took effect only upon the death of the testator, and that the statutes in force in the Indian Territory at the time of the Congressional enactment required a much higher degree of proof to establish a will and to establish the acknowledgment thereto than was required of a deed of conveyance duly acknowledged and certified.

It need not be decided that the testimony of the United States Commissioner is the only method by which the "acknowledgment" provided for by the Act

of Congress may be proven, but certainly the testimony of the Commissioner himself was the best character of evidence obtainable and was, at least, a permissible form of proof. Congress, nowhere, evidences an intent to change this rule of evidence. Congress could easily have said that a certificate of acknowledgment executed by a United States Commisisoner would be sufficient evidence of the fact of such acknowledgment, but this Congress did not do, and this shows the absence of any intent on the part of Congress to change the law of evidence in respect to the character of proof required to prove the acknowledgment to a will.

It is true that the word "acknowledged" in statutes requiring that a will be acknowledged is the same word as that employed in statutes requiring that a deed be "acknowledged," but the sense in which the word is used is quite different. The former is employed in the sense of an acknowledgment in fact, and the latter is employed in the sense of a certificate of acknowledgment.

The obvious intent of Congress was to prevent fraud when it required that the will of a full-blood Indian be acknowledged before certain designated officers, but it would appear that if the opinion of the lower court is the law applicable, it may have the effect of opening the

door to fraud. The proper inference to be drawn from the opinion of the court below is that a will may be introduced in evidence without further proof of its acknowledgment, if it bears a certificate of acknowledgment.

At the trial of this cause the United States Commissioner did testify that the testator did acknowledge the instrument to be his will. Under the rules of evidence, if his personal presence was obtainable, he was an indispensable witness. He could have placed on the will itself any form of acknowledgment, but it would have been the bounden duty of the trial court to declare the will invalid as a devise of restricted Indian land, if this particular witness had not been produced or his absence accounted for, in which event secondary evidence of such acknowledgment would probably have been competent.

It is respectfully submitted that under the facts as they appear in this record, and under the law applicable to this case, the decision and judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

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